

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :
an agency, and the UNITED STATES OF AMERICA, :

Plaintiffs, :

v. :

WOOD, WIRE AND METAL LATHERS INTERNATIONAL :
UNION LOCAL UNION NO. 46, THE JOINT APPREN- :
TICESHIP COMMITTEE OF THE EMPLOYING METALLIC :
FURRING AND LATHING ASSOCIATION OF NEW YORK :
AND LOCAL NO. 46 of the WOOD, WIRE AND :
METAL LATHERS INTERNATIONAL UNION, :

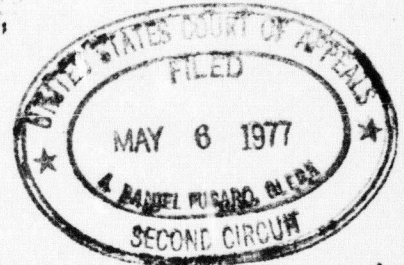
Defendants-Appellees :

DAVID LLOYD FOREMAN, :

Movant-Appellant :

-----X

Docket No. 77-6013



REPLY BRIEF ON BEHALF OF
MOVANT-APPELLANT

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REPLY BRIEF ON BEHALF OF MOVANT-APPELLANT

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: 77-6013

Defendants-Appellees,

DAVID LLOYD FOREMAN,

Movant-Appellant

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REPLY BRIEF ON BEHALF OF MOVANT-APPELLANT

Preliminary Statement

This reply brief is submitted on behalf of Movant-Appellant in response to Defendants-Appellees' brief. Movant-Appellant David Foreman has appealed from an order of the United States District Court for the Southern District of New York denying Movant-Appellant's motion to set aside an Administrator's award.

ARGUMENT

POINT I

DEFENDANT-APPELLEE'S CONTENTION THAT THE TITLE VII ACTION AGAINST THEM WAS RESOLVED BY THE SETTLEMENT AGREEMENT IS FACTUALLY WITHOUT MERIT.

Appellee states in their brief:

[Appellant] argues erroneously that because this proceeding started as a Title VII action that that statute provided the remedy to be applied here. The fact is, as the record clearly shows, that the Title VII action was resolved by the parties by the settlement agreement which became an order of the Court.

Appellee's Brief, p. 11.

The record shows just the contrary. The record is clear that subsequent to the Consent Decree, on a motion by the government, Judge Frankel found Appellee in contempt for its failure to implement the Consent Decree. The district court specifically stated that Appellee had engaged in unlawful and contemptuous practices. 328 F.Supp. at 441. Judge Frankel further stated that subsequent to the Consent Decree "the pattern and practice of discrimination has continued." 328 F.Supp. at 434. This is a clear and unequivocal statement that after the settlement agreement, which supposedly resolved the Title VII action, Appellee was in violation of Title VII.

Judge Frankel's findings in this regard were specifically referred to by this court in its decision upholding the hiring hall rules herein at issue in the current case. 471 F.2d 408, 414 n.10*

POINT I

APPELLEE'S CONTENTION THAT IT IS
INAPPROPRIATE TO RELY UPON TITLE VII
TO SET THE STANDARDS FOR RELIEF IS
WITHOUT MERIT.

This Court has, itself, relied upon the broad remedial provisions of Title VII in approving the Hiring Hall Rules ordered by Judge Frankel. 471 F.2d at 413. The Court also relied upon Title VII in approving Judge Frankel's order to issue a minimum number of work permits. The Court said:

Admittedly requiring that the union issue a certain minimum number of permits is sweeping use of the Court's broad power under the Act [referring to Title VII]; it is compelled, however, by Local 46's actions in this case.

471 F.2d at 414.

*Additionally, it is a matter of record that on January 27, 1977 the E.E.O.C. filed another contempt motion, before Judge Frankel, against Appellee for numerous violations of the court's previous orders.

It is therefore wholly appropriate, and consistent, for an award of backpay to be measured against the standards set forth in Albemarle v. Moody 422 U.S. 405 (1975). In fact the district court, in fashioning relief under the contempt finding, stated that black permit holders deprived of outside work because of the unlawful referral practices should receive "the difference between what they earned...and [what] they would have earned but for such unlawful discrimination" 328 F.Supp. at 441. In other words, the union was ordered to pay full backpay. The union's liability was not diminished simply because the employer collaborated in those referral practices and, in fact, was ultimately responsible for hiring and firing. Additionally, as noted by the Administrator in his Decision on the Motions for Reconsideration, there is serious question as to the role of a foreman who hires and fires, and who is concurrently a union member. (See Appellant's Brief, Point IV B. pp. 37-38). The fact is that the union is not as distant from the hiring and firing process as it would like to portray.

Furthermore, Appellant Foreman is a black permit holder; he is clearly within the class of workers who were to be protected by the court-ordered Hiring Hall Rules. The union was aware that those who had been

adversely affected by discriminatory practices prior to Judge Frankel's 1971 decision had been awarded full backpay for the period of time in which they were deprived of work. The union should have been aware of its potential liability to those who, like Appellant Foreman, were adversely affected by a violation of the Hiring Hall Rules. Yet the union never attempted to minimize this liability by placing Appellant's name at the top of the Hiring Hall list so that he might return to work as soon as possible.

Appellee contends that it should escape financial liability since it was not the "malefactor which caused Foreman to lose his job or his earnings." [Appellee's brief p. 14]; this contention simply lacks rationality. It is obvious, on its face, that the Hiring Hall Rules called for Appellee to take affirmative action to insure that job referrals were fair. Likewise Rule VII required Appellee to take affirmative action to insure that any layoff, out of seniority, was for good cause. Appellee never attempted to implement Rule VII. It engaged in the same passive resistance and casual neglect in failing to implement Rule VII that Judge Frankel found so abhorrent in the 1970 contempt citations (328 F.Supp at 438), and which prompted the E.E.O.C. to file its most recent contempt motion.

Appellee contends that it has no control over firing and that the practice in the industry has been employment at will. Such a contention flies in the face of the express mandate of Rule VII. While it is true that the court did not have the employers before it and therefore could not impose its orders upon the employers, the fact remains that as of July 16, 1971 Appellee was on Notice of its obligations under the Hiring Hall Rules (which were upheld by this Court in 1973, 471 F.2d 408) and it made no attempt to bargain a "good cause" provision and grievance machinery into its master contract. Whether or not the employers would have accepted such a provision is immaterial to the question of what good faith efforts the union could or should have made to carry out the district court's order. The union should not now be held blameless with regard to backpay liability. To do so would be to sanction its five years of inaction in attempting to carry out the district courts mandate.

POINT III

APPELLEE'S ATTEMPT TO CHARACTERIZE THE ADMINISTRATOR AS AN IMPARTIAL NEUTRAL WHOSE DECISIONS SHOULD BE ACCORDED THE SAME WEIGHT AS AN ARBITRATOR HAS NO BASIS IN LAW

It is apparent from a reading of Appellee's brief that Appellee misperceives the gravamen of Movant-Appellant's case. Appellee refers, throughout its brief, to the settlement agreement of February 7, 1970 as the document setting forth the authority and power of the Administrator. Appellee notes that the Agreement, which was approved by Judge Frankel in a Consent Decree dated February 24, 1970 provides that the "administrator was empowered by the parties to take all actions. . . as he deems necessary to implement the provisions of this agreement, to ensure the performance of this agreement and to remedy any breach thereof." Appellee's Brief pp. 2-3. (emphasis added). Appellee further notes that decisions rendered under the settlement agreement were to be final. Appellee fails to note, however, that the case at bar does not arise out of the settlement agreement. Rather it arises out of a subsequent proceeding before Judge Frankel in which the Court found Appellee -- Local 46 in contempt of the Consent Decree and, as part of the remedy, directed the parties to attempt to agree on Hiring

Hall Rules. United States v. Wood, Wire and Metal, International Union, Local 46, 328 F.Supp. 429 (S.D. N.Y. 1971). When the parties failed to agree on the hiring hall rules the Administrator submitted a proposed set to the court. After vigorous opposition by Local 46 the rules, with some modification, were adopted by Judge Frankel on July 16, 1971.

At no time did Local 46 consent to the Hiring Hall Rules or consent to be bound by the Administrator's decisions interpreting those rules. As a matter of fact on January 21, 1977 Appellee, themselves, appealed the Administrator's Decisions rendered under Rule VII, in the cases of Norman Nairne et al (see A 186 - 194) on the grounds that the Administrator's Decisions were arbitrary, capricious and an abuse of his authority. So, while Appellee is stating to this Court that review should be drastically limited, the Appellee is asking the district court to overturn the Administrator on grounds quite similar to at least one of Appellant's contentions i.e. that the limited remedy granted Foreman conflicts with the full remedy granted Norman Nairne et al.

It is further clear that public policy dictates that the federal courts shall have the right to fully review matters arising out of Title VII. The Supreme

Court in the landmark case of Alexander v. Gardner-Denver, 415 U.S. 36 (1974) examined the entire question of the court's review of arbitral decisions -- in great detail. It is obvious from the holding of that case that a Title VII claimant is entitled to a de novo review of his claim in federal court, although the arbitral decision may be "accorded such weight as the court deems appropriate" (footnote omitted) id at 60. The Court stated: "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal." id at 56.

Appellee argues, implicitly, that the Administrator's decisions should not be reviewable even where there are mistakes of fact or law in his decision. (Appellee's brief, p. 16) Such position is clearly not consonant with the Supreme Court's analysis in Gardner-Denver, supra.

The role of an Administrator was set out by Judge Henry Werker in his Memorandum Opinion ordering the Affirmative Action Program in the Local 28, Sheet Metal Workers case wherein he said:

It should be noted by the parties that in the court's concept of the role of the Administrator, he is not a neutral person. He is the executor of the order and judgment of the court and its alter ego, and to that extent, he is partisan to the letter and spirit of the court's judgment.

E.E.O.C. v. Local 638 . . . Local 28
of the Sheet Metal Workers' Interna-
tional Ass'n, 421 F.Supp. 603, 620
(S.D.N.Y. 1975).

It is clear, therefore, that the Administrator is an extension of the court and his opinions can be given no more weight than that afforded the opinions of a district court judge. It is obvious that the court cannot delegate unto another authority which the court itself does not have. Since the court cannot issue unreviewable final orders it is inconceivable that an Administrator could.

The case at bar is indeed, as Judge Frankel noted in his strong memorandum denying Movant-Appellant's motion, "a rare case." This case puts squarely before this Court the question of what authority a court appointed Administrator should have in a Title VII Case. The decision of this Court will be far-reaching since the district courts in this circuit have followed Judge Frankel's lead and have appointed Administrators in at least four other cases, all arising from Title VII.*

*E.E.O.C. Local 14 . . . and Local 15, International Union of Operating Engineers, ___ F.Supp. ___ 13 FEP Cases 1490 (S.D.N.Y. 1976); E.E.O.C. v. Local 638 . . . Local 28, Sheet Metal Workers' International Ass'n, 12 FEP Cases 733 (S.D.N.Y. 1976), Mod. on other grounds, 532 F.2d 821 (2d Cir. 1976); Rios v. Enterprise Ass'n Steamfitters, Local 638, 360 F.Supp. 979 (S.D.N.Y. 1973), Mod. on other grounds, 501 F.2d 622 (2d Cir. 1974); Patterson v. Newspaper and Mail Deliverers Union, 384 F.Supp. 585, at 593 (S.D.N.Y. 1974), aff'd 514 F.2d 767 (2d Cir. 1975).

This Court must answer the fundamental questions posed in this case. First, is an Administrator shrouded with the authority to make decisions which are subject to the narrow review accorded arbitrators as Appellee contends, or is the Administrator an extension of the court whose essential purpose is to resolve day to day disputes but whose final decisions are nonetheless reviewable by the court on application of a party as contended by Movant-Appellant?

Second, what should the standard of review be? Should an Administrator's decision be final and binding even where the Administrator has made errors of fact or law as contended by Appellee [Appellee's Brief, p. 16]; or should the Administrator's decisions be subject to review to the same extent as a district judge's final decision?

Third, even if, arguendo, the Court determines that an Administrator has the indicia of an arbitrator, what review standard should apply. Should the review be limited by the dictates of the Supreme Court in United Steelworker of America v. Enterprise Wheel and Car Corp. 363 U.S. 593 (1960) as contended by Appellee (Appellee's Brief, p. 12); or should the review be pursuant to the Supreme Court's decision in Alexander v. Gardner Denver?

It is the position of Appellant that the concept of an Administrator is unique to American jurisprudence. He is not an arbitrator, referee, special master or mediator. He is, as Judge Werker noted, the alter ego of the court whose job it is to enforce the courts judgment. His purpose is to resolve day to day disputes between the parties and insure that the court's will is carried out. While such a role is designed to free the court from the onerous burdens of monitoring its decrees on a daily basis, it could not and should not be the intent of the court to relieve itself of reviewing decisions, that are objected to, to insure that the law is being properly administered.

CONCLUSION

For the reasons stated herein, and for the reasons stated in Brief on Behalf of Movant-Appellant dated March 25, 1977, Appellant respectfully requests that this matter be remanded to the District Court for a finding as to the amount of backpay due Appellant.

Dated: May 6, 1977

RESPECTFULLY SUBMITTED,

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